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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1966

No. 721

PEACOCK RECORDS, INC., a Texas Corporation, and DON D. ROBEY, a citizen of Texas,

Petitioners,

vs.

CHECKER RECORDS, INC., an Illinois Corporation, CHESS RECORD CORP., an Illinois Corporation, and PHIL CHESS and LEONARD CHESS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

To: *The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Peacock Records, Inc., and Don D. Robey, respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been reported. It is attached hereto as Appendix 1.

JURISDICTION.

The decision of the United States Court of Appeals for the Seventh Circuit was entered on July 26, 1966. The jurisdiction of this Court is invoked under Title 28, U.S. Code, Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether the United States Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decisions of the United States Court of Appeals for the Ninth Circuit.

2. Whether this court should exercise its supervisory power to straighten out the procedure pursuant to a motion under Rule 60(b).

STATEMENT OF FACTS.

This was an appeal from an order of the District Court for the Northern District of Illinois entered on August 19, 1965, on a motion by defendants under Rule 60(b), F.R.C.P., to vacate a judgment of that court in favor of plaintiffs in the amount of $150,000 and costs. That motion was filed in the district court, with leave of that court, on or about June 22, 1965. The Court on June 16, 1965, had denied a motion by defendants to remand an appeal from the same judgment, still pending. The motion to remand was made to enable defendants to file a motion under Rule 60(b). In denying the motion to remand, the Court cited *Binks Mfg. Co.* v. *Ransburg Electro-Coating Corp.*, 281 F. 2d 252 (7th C.A. 1960), and found that "no showing has been made that the district court has indicated that it will allow motions for defendants-appellants under Rule 60(b), F.R.C.P."

Since the order appealed from contained a succinct description of the proceedings before that court on the motion as well as its findings, it is set forth below in *haec verba*:

> "This matter came on for hearing on a petition by the defendants under Rule 60(b) of the Federal Rules of Civil Procedure supported by affidavits of Leonard Chess, Loyd Woodard, J. T. Clinkscales and Lawrence Abram and a reply thereto by the plaintiffs. In substance those affidavits, taken *ex parte* by one of the defendants and their counsel, are to the effect that the contract relied on by plaintiffs in this cause was not made prior to that relied on

by defendants, that affiants, except Chess, testified falsely on the trial to the contrary because they had conspired with Robey so to do.

This cause is now pending on appeal in the Court of Appeals for the Seventh Circuit from a judgment entered by this Court on or about September 21, 1964, in favor of the plaintiffs and against the defendants. Defendants filed a motion to remand the cause to this Court in the Court of Appeals on or about the 7th day of May, 1965, supported by the same affidavits. That motion was denied by the Court of Appeals by an order dated the 16th day of June, 1965, in which that Court outlined the proper procedure as being the filing of a petition under Rule 60(b) in this Court and that Court observed that if this Court indicated that it would grant the motion the Court of Appeals should then be requested to remand the cause.

This Court conducted hearings on the defendant's petition on August 10 and August 17, 1965. At the hearing on August 17 the defendants tendered to the Court as witnesses Loyd Woodard, J. T. Clinkscales, Lawrence Abram and his wife, Dorothy Abram. Each of these persons had testified before this Court during the course of the trial of this cause. Lawrence Abram had been called as a Court's witness because of his prior inconsistent statements and the other three were called as witnesses by the plaintiffs and had been cross examined at length by counsel for the defendants. Woodard and Abram were also called by defendants.

On motion of counsel for the plaintiffs and it appearing that none of these persons had sufficient

funds to employ counsel, this Court appointed counsel to advise each of these witnesses as to his constitutional right to refuse to testify with respect to any questions which might incriminate him and to advise each of them of the pains and penalties of perjury and contempt of court. Each affiant indicated his willingness to testify. On objection of counsel for defendants this Court refused to hear further testimony by affiants.

This Court has considered the petition of the defendants and the reply thereto, the affidavits filed in support of the petition, the testimony of these affiants on the trial and their pre-trial sworn statements and depositions, the conduct, demeanor and credibility of all of the witnesses on the trial, the testimony of other witnesses including the defendants, the other evidence adduced on the trial, and the arguments of counsel for plaintiffs and defendants on the hearing of this petition. On the basis of all of this, this Court is of the opinion and finds:

1. Defendants by their petition seek only to raise again an issue which was raised by their counterclaim and which was heard and decided against them on the trial.

2. The decision of this Court on the trial was not based on the testimony of the affiants alone which, in the main was corroborative, but rather was based on all of the evidence and this Court's judgment as to the credibility of each of the witnesses.

3. It is inherently incredible that these affiants, three of whom are blind, voluntarily offered to admit that they committed perjury on the trial of this

cause, particularly in light of the admission by defendants that they paid money to another witness in this cause, Wilmer Broadnax, to make a false pre-trial sworn statement, and the evidence that they had also paid Abram to make a false pre-trial sworn statement.

4. The affidavits of Lawrence and Dorothy Abram were taken by defendants' counsel on March 24 and 25, 1964, while post-trial motions were pending in this Court but were not brought to the attention of any court until after the affidavits of Woodard and Clinkscales had been secured more than a year later because, admittedly, counsel for defendants did not regard the affidavits of the Abrams as sufficient to warrant this Court in vacating its judgment.

5. There is no showing or offer of any showing sufficient under Rule 60(b) to warrant this Court in vacating the judgment heretofore entered in this cause.

6. Accordingly the Court of Appeals should be advised by this Court that it would not grant the petition under Rule 60(b) if the cause were remanded.

7. The Department of Justice should be, and it has been, requested to investigate this matter to determine whether any criminal or contempt proceedings should be brought against any person or persons in connection therewith.

It Is Therefore Ordered that the Court of Appeals for the Seventh Circuit be advised by the Clerk of this Court of the findings and view of this Court with respect to the petition of defendants, and the Court certifies to the Court of Appeals that it would

not grant the motion to reopen this cause even if it had jurisdiction so to do."

The order of the district court makes it clear that review of that order requires consideration by this Court of the entire course of proceedings before that court.

This cause began on November 2, 1962, when plaintiffs charged in a five count complaint, that the defendants by making and distributing records by the artists, had knowingly infringed on plaintiffs' exclusive advantageous contractual relationships for their exclusive services as recording artists with a gospel vocal group known as the "Original Five Blind Boys of Mississippi—Jackson Harmoneers," under a contract entered into on or about October 5, 1960, at Houston, Texas, continuing a long, similar contractual relationship between the parties; and with a minister, Reverend Robert Ballinger, under a similar contract entered into on or about July 5, 1959, at the same place. The complaint also charged interference by the defendants with certain exclusive music publishing contracts owned by the plaintiffs. In addition, the complaint charged a conspiracy among defendants to interfere with plaintiffs' rights to these exclusive recording contracts and others. Plaintiffs asked damages in the total amount of $450,000. In accordance with F.R.C.P., copies of all contracts relied on were attached to the complaint.

On December 18, 1962, defendants filed an answer denying substantially all of the material allegations of the complaint, and a counterclaim asserting that defendants had an exclusive recording contract with the Five Blind Boys entered into on or about December 22, 1960, at Chicago, Illinois, and that plaintiffs had interfered with it. Plaintiffs answered the counterclaim denying its allegations.

Thereafter, on April 4, 1963, pursuant to leave of court first had and obtained, over the objections of plaintiffs, the corporate defendants filed an amended counterclaim charging that plaintiffs had interfered with defendants' exclusive advantageous contractual arrangements with The Five Blind Boys for their services as recording artists by fraudulently inducing them to breach their contract with defendants and that plaintiffs had conspired with them to commit perjury and maliciously file this suit based upon false and manufactured evidence. By an answer filed in apt time plaintiffs denied the allegations of this amended counterclaim.

On December 17, 1963, just prior to the conclusion of the trial, over the objection of plaintiffs, the defendants were granted leave of court to further amend the amended counterclaim by adding the individual defendants, Leonard and Phil Chess, as counter-claimants. The defendants asked damages in their twice amended counterclaim aggregating $1,500,000. On December 24, 1963, with leave of court, the plaintiffs filed an answer to the further amended counterclaim denying its allegations and alleging that its charges were baseless and unfounded, that the defendants knew it, and that the charges of the amended counterclaim were made for the purpose of harming and damaging plaintiffs and misleading the court as to the merits of plaintiffs' complaint. Plaintiffs, on those grounds, sought additional damages of $150,000.

The trial in this cause, without a jury, began on September 24, 1963. By direction of the court the defendants were permitted to proceed at the outset with proof in support of the amended counterclaim. They called fourteen witnesses. Among them were the individual plain-

tiff, called as an adverse witness, and the individual defendants, including Leonard Chess whose affidavit was offered in support of the motion. Also included among the witnesses called by defendants were Loyd Woodard and Lawrence Abram, both of whose affidavits were offered in support of the motion under Rule 60(b). Upon it appearing that Mr. Abram had made conflicting pretrial statements under oath, one after he had been drinking heavily, the court directed that Abram be considered a court's witness in order that both sides could cross examine him, which they did.

Plaintiffs called twenty-four witnesses and tendered the deposition of another, to support plaintiffs' denial of the charges contained in the amended counterclaim and to prove the allegations of the complaint. Among these were the individual plaintiff and Loyd Woodard and J. T. Clinkscales, the remaining person whose affidavit was offered in support of defendants' motion under Rule 60(b). Included among the witnesses called by plaintiffs there was also Mrs. Lawrence Abram. Though her affidavit was not offered in support of the motion, she was tendered to the court on the hearing on the motion as a witness for defendants.

Consideration of the evidence as to defendants' amended counterclaim consumed nineteen court days between September 24, 1963, and October 30, 1963.

On November 4, 1963, after defendants had rested as to their counterclaim, the court allowed plaintiffs to begin to present evidence in support of the counts of the original complaint not controverted by the amended counterclaim; that is, those counts not involving the contracts with the Five Blind Boys. Plaintiffs presented six wit-

nesses in support of those allegations and the defendants tendered three witnesses in support of their answer to those parts of the original complaint. Among these witnesses was the individual defendant, Leonard Chess, who thus testified for the third time. Four court days were devoted to hearing these witnesses.

Thereafter, the court heard arguments of counsel for two days, permitting counsel for defendants to open.

Subsequently, defendants presented four witnesses in support of their claim for damages, including one of its then counsel and one of its present counsel in this Court. The plaintiffs also presented four witnesses with respect to damages claimed by them, including one of their counsel. The proceedings before the court on damages covered an additional five court days.

Thus the district court devoted thirty days to the trial of this cause over a period of four consecutive calendar months, and heard approximately fifty witnesses, some more than once. In addition, the court considered approximately one hundred forty exhibits tendered by plaintiffs and more than seventy exhibits tendered by defendants.

Among these exhibits there were pre-trial statements, under oath, by each of Woodard and Clinkscales taken *ex parte,* by counsel for plaintiffs. In addition, filed with the court, there was a lengthy deposition of each of these witnesses and of Lawrence Abram taken by plaintiffs in accordance with F.C.R.P. The exhibits also included two pre-trial statements, under oath, by Lawrence Abram. One of these statements was taken in the same manner as those of Woodard and Clinkscales. The other had been taken *ex parte* thereafter by counsel for defendants but prior to the taking of Abram's deposition.

Woodard, Clinkscales, and Abram, who are blind, all testified on the trial in corroboration of the testimony of the individual plaintiff and three other eyewitnesses that the singers had executed the contract with them relied on by plaintiffs at the time and place and under the circumstances alleged in the complaint. Their pre-trial statements and depositions were to the same effect except for the statement of Abram taken by counsel for defendants. In his testimony on the trial, as in his deposition, Abram repudiated that statement and both he and Mrs. Abram testified that he had been drinking heavily when he made it and that he was paid by defendants to make that false statement.

One of the other members of the singing group, Broadnax, who is sighted, also testified that the contract was executed as alleged in the complaint. He, like Abram, had made a contrary *ex parte* statement under oath at the instigation of counsel for defendants. Both that statement by Broadnax, and a prior one taken by counsel for plaintiffs to the same effect as his testimony, were exhibits at the trial. Broadnax, also like Abram, repudiated the statement he had made for defendants' counsel and testified that one of the individual defendants, Phil Chess, had paid him $700 to make the statement and told him what to say, and that later, at the urging of his family, he, Broadnax, had returned the money to the Chess'. On the trial Phil Chess admitted the payment and the return of the money. In the motion for leave to file the amended counterclaim, however, on April 4, 1963, defendants asserted that the individual plaintiff, Don Robey, had given the money to Broadnax to send to the Chess' to discredit them.

On the trial Mrs. Abram testified at length as to the financial and other offers made to her by Leonard Chess, Rosco Robinson, one of the sighted members of the singing group, and one of counsel for defendants to get her to induce her husband, on his deposition, to testify in support of the contentions of defendants. Among the inducements was a recording contract, in evidence, between Mrs. Abram, who had no professional singing experience, and a recording company owned by the Chess' which was not in production. Leonard Chess admitted signing that contract along with Mrs. Abram the night before counsel for defendants took her husband's deposition. That counsel never denied it.

The remaining member of the singing group, Rosco Robinson, was called as a witness by defendants. Of the fourteen witnesses called by them he was the only one who testified in support of the allegations of their amended counterclaim. On cross examination, however, he admitted making a contrary pre-trial statement under oath which was in evidence. Other substantial discrepancies in his testimony were developed on cross examination. In addition, Robinson admitted that Leonard Chess had hired him to get the other members of the group to support his contentions. Leonard Chess admitted paying Robinson substantial sums as to which both claimed to have no record. All of the other members of the singing group and other witnesses testified to Robinson's efforts to procure testimony favorable to defendants. This evidence was not challenged.

In an effort to show that the singing group was not in Houston, Texas, on October 5, 1960, when their contract with plaintiffs was executed, defendants put in evidence

what were claimed to be records of a small hotel in Savannah, Georgia, purporting to show that the group was there at that time filling a singing engagement. Cross examination of defendants' witnesses and testimony of witnesses called by plaintiffs made it clear that these hotel "records" had been altered and some had been made after the start of this case. In contrast, plaintiffs introduced Houston hotel records whose authenticity was not shaken, of the presence there of the group at the time the contract was executed and evidence that they filled professional engagements in that area at that time.

On January 17, 1964, the district court entered detailed findings of fact and conclusions of law on all of the issues raised by the pleadings and evidence sustaining substantially all of the contentions of the plaintiffs, and a judgment order in favor of plaintiffs on each of the counts of the complaint and against the defendants on each of the counts of the amended counterclaim. On the same day a judgment in the amount of $250,000 and costs was entered in favor of plaintiffs and against defendants, jointly and severally.

On January 27, 1964, the defendants filed a motion to amend the findings of fact, for a new trial, to amend the judgment and for stay of execution, under F.R.C.P., Rules 52, 59 and 62. In that motion defendants again raised the issues involved in the complaint and the amended counterclaim and sought a reduction in the amount of damages awarded to $7,000. After hearing argument on this post-trial motion on several different dates, the district court amended its findings of fact and conclusions of law solely to reduce the judgment in favor of plaintiffs and against defendants to $150,000 and costs.

REASONS FOR GRANTING THE WRIT.

In 1957 the United States Court of Appeals for the Ninth Circuit decided the oft cited case of *Atchison, Topeka & Santa Fe Railway Co.* v. *Barrett,* 246 F. 2d 846, wherein the United States Court of Appeals for the Ninth Circuit denied a motion to vacate and set aside a judgment pursuant to Rule 60(b) although the petitioner alleged that the judgment had been obtained by fraud, misrepresentation and other misconduct. On appeal the United States Court of Appeals for the Ninth Circuit stated that judgments obtained through fraud, misrepresentation and other misconduct should be vacated pursuant to Rule 60(b) and that the rule should be construed liberally.

Notwithstanding those general principles, it further stated that while the effect of perjury, which has influenced the court, will not be weighed on a motion to set aside the judgment, it then stated at pp. 849 and 850 that:

> "[5, 6] Such a motion for relief is directed to the sound discretion of the trial court, and particularly to the discretion of the trial judge who 'presided in the litigation in which the judgment (now alleged as fraudulent) was entered.' *Independence Lead Mines* v. *Kingsbury,* 9 Cir., 175 F. 2d 983, 988. Discretion is peculiarly and properly left in the trial court in matters of this kind. Not only must there be clear and convincing evidence of fraud, but it must be such as prevented the losing party from fully and fairly presenting his case or defense. *Independence Lead Mines* v. *Kingsbury,* supra, at page 988; *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399, 421, 43 S. Ct. 458, 67 L. Ed. 719. The trial judge saw and heard the plaintiff; saw his twitchings, what they

were and what they were not, as did the jury. He saw or heard the other matters relied on by appellant; he felt the 'climate' of the trial. The trial judge found no fraud nor misrepresentation. [Tr. p. 180] The Court of Appeals should not and will not substitute its judgment for that of the trial court, nor reverse the lower court's determination save for an abuse of discretion. 3 Barron & Holtzoff, Fed. Prac. & Procedure, p. 253; *Cole* v. *Fairview Develop.*, 9 Cir., 1955, 226 F. 2d 175; *Stafford* v. *Russell*, 9 Cir., 220 F. 2d 853; *Parker* v. *Checker Taxi Co.*, supra, 238 F. 2d at page 243; *Jones* v. *Jones*, 7 Cir., 1954, 217 F. 2d 239; *Independent Lead* v. *Kingsbury*, supra.

"[7] Our research fails to disclose a single case in this Circuit where this Court has reversed a trial judge on a matter of this kind. We should not commence innovation on the factual basis of this case."

Whereas in the instant case, the United States Court of Appeals for the Seventh Circuit ruled that the testimony and "climate" of the trial, could not have determined whether the witnesses perjured themselves without hearing oral testimony in support of the motion under Rule 60(b).

At this point, it must be remembered that the witnesses who sought to testify on the motion, had testified on trial about offers that had been made to induce them to perjure themselves and one of the individual defendants had admitted paying $700 to a witness for a false, sworn, *ex parte* pre-trial statement. It is implicit in the findings that the judge considered it quite possible that the offers had now been accepted, for he ruled:

"3. It is inherently incredible that these affiants, three of whom are blind, voluntarily offered to admit that they committed perjury on the trial of this cause. * * *"

Thus, the Judge clearly indicated his determination of the credibility of the witnesses testimony on trial.

He further clarified his position when he ruled:

> "The decision of this Court on the trial was not based on the testimony of the affiants alone which, in the main was corroborative, but rather was based on all of the evidence and this Court's judgment as to the credibility of each of the witnesses."

In spite of this, on appeal, the Court stated:

> "The effect of this order [denying the motion], if permitted to stand, is to avoid a specific, direct judicial injury and determination as to the truth of the sworn statements."

It then found that the trial court abused its discretion because it did not hear further testimony of affiants, whose credibility the trial judge had clearly established in his own mind. It is obvious that the trial judge's conduct was not in abuse of his discretion within the bounds set down and enforced by the Ninth Circuit. He had determined whether the witnesses had perjured themselves and "such motion for relief is directed to (his) sound discretion." Yet this was not sufficient in the Seventh Circuit.

We submit that a district judge must listen to affiants on a motion under Rule 60(b) if the case is brought in the Seventh Circuit, but need not do so if the case is brought in the Ninth Circuit. Moreover, this conflict in decisions can only be resolved by this court.

The decision of the Court of Appeals severely limits the District Court judge in the exercise of his discretion. Rule 60(b) Fed. Rules, Civil Practice provides that:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative

from a final judgment, order or proceeding for the following reasons:

> (3) Fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party, * * *"

Accordingly, the district court ordered:

"This Court conducted hearings on the defendants' petition on August 10th and August 17, 1965. At the hearing on August 17 the defendants tendered to the Court as witnesses Loyd Woodard, J. T. Clinkscales, Lawrence Abram and his wife, Dorothy Abram. Each of these persons had testified before this Court during the course of the trial in this cause. Lawrence Abram had been called as a Court's witness because of his prior inconsistent statements and the other three were called as witnesses by the plaintiffs and had been cross examined at length by counsel for the defendants. Woodard and Abram were also called by defendants.

"On motion of counsel for the plaintiffs and it appearing that none of these persons had sufficient funds to employ counsel, this Court appointed counsel to advise each of these witnesses as to his constitutional right to refuse to testify with respect to any questions which might incriminate him and to advise each of them of the pains and penalties of perjury and contempt of court. Each affiant indicated his willingness to testify. On objection of counsel for defendants this Court refused to hear further testimony by affiants.

"This Court has considered the petition of the defendants and the reply thereto, the affidavits filed in support of the petition, the testimony of these affiants on the trial and their pre-trial sworn statements and depositions, the conduct, demeanor and credibility of all of the witnesses on the trial, the testimony of other witnesses including the defend-

> ants, the other evidence adduced on the trial, and the arguments of counsel for plaintiffs and defendants on the hearing of this petition. On the basis of all of this, this Court is of the opinion and finds:"
>
> * * * * *

Rule 43(e) FRCP supports the foregoing statement. It makes it clear that the right to present oral testimony pursuant to a motion is a matter of discretion for the district court. The rule provides:

> "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

In *Cuthill* v. *Ortmann-Miller Machine Co.*, 249 F. 2d 43 (C.A. 7th 1957), appellant sought to intervene, after judgment, in an action against a corporation in which he was a substantial stockholder. He alleged that the judgment had been obtained by fraud and filed a motion to have the judgment set aside under Rule 60(b). The Appellate Court affirmed the trial court's decision and stated:

> "It was the duty of the trial court to weigh the evidence and determine the credibility of the witnesses."

In the instant case defendants have had many days in court. They raised, and the district court passed on at the trial, exactly the issue raised on the motion under Rule 60(b). The only difference is that now after judgment against them, defendants charge that a fraud was perpetrated on the trial court because four witnesses made *ex parte* statements inconsistent in part with their testimony at the trial. One of these witnesses did the same thing before the trial. But the testimony of these witnesses was

only a small part of the evidence taken and considered by the district court on the trial and it so found. Most important, the district court refused to find that its judgment was induced by fraud.

Of significance in reviewing the procedure here is the fact that after remand, on the hearing of the motion in the *Cuthill* case, supra, just as in this case, the district court considered the pre-judgment proceedings. Appropriately, this Court likewise considered those pre-judgment proceedings on review of the district court's action and affirmed it.

Under all the circumstances here, we submit that the district court properly refused to hear further oral testimony of these affiants.

In this connection we respectfully direct this Court's attention to F.R.C.P., Rule 61 which provides:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

As this Court observed in *Keaton* v. *Atchison, Topeka and Santa Fe Railroad Company,* 321 F. 2d 317, 319 (C.A. 7th 1963):

* * * * *

> "This rule technically is a 'mandate' to District Courts, but Courts of Appeals 'gladly' follow the rule

as the best practice. 7 Moore, Federal Practice 1030 (2d ed. 1955)."

Assuming that the District erred in not hearing oral testimony on the motion pursuant to Rule 60(b), the district judge who devoted thirty days to trial, heard fifty witnesses and considered more than two hundred exhibits, was so convinced of the substantial justice in his decision that he found:

> "There is no showing or offer of any showing sufficient under Rule 60(b) to warrant this court in vacating the judgment heretofore entered in this cause."

If there be error at all, is this such an error that merits the vacating of all that preceded?

CONCLUSION.

We submit that the Court's vacating of the judgment is in contravention of all precedent upon which a district judge relies when entertaining a motion to vacate pursuant to Section 60(b) FRCP and negates the time and effort spent by a trial judge who is in the best position to determine the merits of the motion.

If the decision of the Court of Appeals is not reversed, there will be an inevitable inducement to procure post-trial perjury and no end to litigation.

For the above and foregoing reasons, the petitioner prays that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM R. MING, JR.,
ELLIS E. REID,
Attorneys for Petitioners.

APPENDIX "1"

In the United States Court of Appeals For the Seventh Circuit

Nos. 14944, 15382
SEPTEMBER TERM, 1965 — APRIL SESSION, 1966

PEACOCK RECORDS, INC., a Texas corporation, and DON D. ROBEY, a citizen of Texas,
Plaintiffs-Appellees,
vs.
CHECKER RECORDS, INC., an Illinois corporation, CHESS RECORD CORP., an Illinois corporation, and PHIL CHESS and LEONARD CHESS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 26, 1966

Before SCHNACKENBERG, CASTLE and KILEY, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* In a diversity action in the district court, Checker Records, Inc., and Chess Record Corp., Illinois corporations, Phil Chess and Leonard Chess, defendants, appeal from a judgment against them in No. 14944 in favor of Peacock Records, Inc., a Texas corporation, and Don D. Robey, a citizen of Texas, plaintiffs, for $250,000 (later reduced to $150,000). The case was tried without a jury.[1]

[1] Tried first was an amended counterclaim which charged in two counts that plaintiffs interfered with defendants' rights to record a certain group of vocalists, and a conspiracy to manufacture false evidence for the purpose of maliciously prosecuting defendants, including bringing this suit. The court found against defendants on both counts.

Plaintiffs' complaint, which defendants answered, contained five counts. Count I alleged violation by defendants of plaintiffs' contractual relations with the Blind Boys, a group of singers; count II relied on a supposed violation by defendants of plaintiffs' contractual relations with Reverend Ballinger; count III charged conspiracy by defendants to interfere with Peacock's contracts described in counts I and II; count IV prayed for injunctions against interference with its contracts by defendants; by count V, plaintiff Robey sought damages from defendants for their alleged fraudulent interference with Robey's contractual relations with composers Loyd Woodard and Roscoe Robinson.

It has been the contention of plaintiffs that the Blind Boys occupied a pre-eminent position as singers of gospel music and that plaintiffs made substantial advances on royalties to them and spent substantial sums in promotion of sales of their records. Plaintiffs have also contended that there is uncontradicted evidence that defendants tried to buy the rights of plaintiffs to record these and other artists.

There was evidence as to sales by and profits accruing to plaintiffs on sales of records of the Blind Boys, under count I, including the opinion of a business specialist in the gospel music field that the exclusive right to record these singers for a year was worth $20,000 to $25,000.

There was evidence as to the quantum of sales of records made by Reverend Ballinger for plaintiffs under count II and the admission by defendants of royalties on music written by Robinson and Woodard,[2] which were collected by defendants, under count V.

On January 17, 1964, the court entered a judgment in favor of plaintiffs for $250,000 which was reduced on September 21, 1964, as above indicated, to $150,000. Appeal No. 14944 has brought this judgment as amended to this court.

On June 22, 1965 defendants appeared by counsel and moved to vacate the judgment of September 21, 1964, pursuant to rule 60 (b) of the Federal Rules of Civil

[2] They were two of the Blind Boys.

Procedure, on the ground, *inter alia*, that it was obtained by fraudulent practices on the part of plaintiffs, by means of which they procured and suborned perjured testimony at the trial material to the issues and controlling in the result thereof, which motion was accompanied by supporting affidavits of Leonard Chess, a defendant, and Loyd Woodard, J. T. Clinkscales and Lawrence Abram. On July 9, 1965, plaintiffs filed an answer.

On August 10, 1965, a hearing on the motion under rule 60 (b) was begun. Called as witnesses by defendants, on August 17, 1965, were three of the Blind Boys and, by the court, the wife of one of them. The court appointed counsel to advise these witnesses of their rights to refuse to testify and the consequences in case they chose to testify. Thereafter they appeared with court-appointed counsel and stated that they were ready to testify. But the court did not take any further testimony of these witnesses. Instead it stated:

> "* * * the more I go into it, the more serious it becomes as to whether or not I should consider this petition[3] at all.
>
> * * *
>
> "* * * Now, mysteriously two of the other witnesses just voluntarily come in and want to tell the truth to clear their conscience. It just sounds thin to me, gentlemen. I am going to refuse to consider this petition. I will indicate to the Court of Appeals, first, that I do not think I have jurisdiction; second, if I do have jurisdiction, that I do not think it is the kind of petition based upon the kind of evidence that the Court should reopen a judgment after these many long months, because I think what Mr. Ming has said and having in mind particularly my memory of the testimony of some of the things that the plaintiffs themselves swore to under oath—not the plaintiffs, but rather the defendants Chess swore to in this court, the payment of money that they themselves admitted was made in this hearing—I am just not of the opinion that this case should be reopened and I will advise the Court of Appeals

[3] Motion under 60 (b).

that in my judgment it should not be opened; that it will furnish just exactly the opportunity that Mr. Ming has pointed out for endless litigation of this type of case.

"These Five Blind Boys have my deepest sympathy. They are the pawns and they are in the middle of this fight.

"As I indicated to you, gentlemen, I am going to continue to ask that this be further investigated to see what has happened in this case. It is very serious. I will indicate to the Court of Appeals that I will not—I had thought I should grant a hearing, but on further consideration, I think it is not a matter that I should grant a hearing in at all. I think the time to dispose of it is here and now. Let the Court of Appeals pass upon this judgment. I will enter a formal order in accordance therewith."

On August 19, 1965 the court entered the order (from which defendants appeal in No. 15382) in which the court set forth as a reason for its finding:

"3. It is inherently incredible that these affiants, three of whom are blind, voluntarily offered to admit that they committed perjury on the trial of this cause, * * *."

and advised us that it would not grant the "petition" under rule 60 (b) if the cause were remanded.

The effect of this order, if permitted to stand, is to avoid a specific, direct judicial inquiry and determination as to the truth of the sworn statements, to which the court refers.

Inferentially the district court concedes that the testimony of these persons at the trial was part of the evidence upon which the judgment under attack was based. We hold that where it appears that perjured testimony may have played some part in influencing the court to render a judgment, the perjury will not be *weighed*, on a motion to set aside the judgment. This seems self-evident. The factual question which the district court failed to answer is, "Was the judgment obtained in part by the use of perjury?" *A. T. & S. F. Ry. Co.* v. *Barrett*,

9 Cir., 246 F.2d 846, 849 (1957). If it was, then it was clearly the duty of the district court to set aside the judgment, because poison had permeated the fountain of justice. Thus, in that event, this taint had affected the entire proceeding in the court below, although we find no indication that any counsel herein was a party to any wrongdoing.

Perhaps nothing could be more helpful in emphasizing the correctness of the result we now reach than a reference to *Parker* v. *Checker Taxi Company*, 238 F.2d 241 (1956), now relied on by plaintiffs, where we expressly, at 243, recognized that

> "The inherent right of the court to vacate a judgment for fraud, as stated above, is strengthened by Rule 60 (b), Federal Rules of Civil Procedure, 28 U.S.C.A., which provides that on motion the court may relieve a party from a final judgment or order for fraud, misrepresentation, or other misconduct of an adverse party."

In *Parker*, at 244, we pointed out that

> "The court had nothing before it except the record in the case and the bare petition made on behalf of Field by its attorneys and verified by one of them on information and belief. The record fails to show any additional proof offered by Field prior to or at the time of the hearing."

On the other hand, in the case at bar, the district court had before it, not only the record in the case, but the motion under rule 60 (b), supported by affidavits (which occupy 110 pages of the printed appendix herein), and an indication that witnesses Woodard, Clinkscales, Abram and wife Dorothy, were willing to testify after the court had warned them of their constitutional rights and had appointed counsel for them.

While in *Parker* this court found nothing in the record and the "petition" to justify setting aside the judgment under rule 60 (b) and held that it could not say "from the record before us here" that the district court did not exercise a sound legal discretion when it denied the "petition" under rule 60 (b), in the case at bar the

record affirmatively shows that the district court did have before it, in addition to the verified motion under 60 (b), sworn testimony in open court, which was unimpeached and which so clearly supported the motion that it becomes incumbent upon us to hold that, in denying the motion, the court failed to exercise a sound legal discretion. This action requires that the order from which this appeal (No. 15382) was taken be reversed and that an order be entered by that court granting said motion, and, in No. 14944, vacating the judgment theretofore entered in favor of plaintiffs and against defendants and remanding said cause for a new trial.

In No. 14944 JUDGMENT VACATED AND REMANDED; in No. 15382 ORDER REVERSED AND REMANDED WITH INSTRUCTIONS.

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Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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No. 721

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1966.

PEACOCK RECORDS, INC., a Texas Corporation and DON D. ROBEY, a citizen of Texas,

Petitioners,

vs.

CHECKER RECORDS, INC., an Illinois Corporation, CHESS RECORD CORP., an Illinois Corporation, and PHIL CHESS and LEONARD CHESS,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals is reported at 365 F. 2d 145.

Question Presented

Does the decision below holding the denial of a motion under Rule 60 (b) of the Federal Rules of Civil Procedure to be an abuse of discretion because of the trial court's

refusal to hear clear and unimpeached evidence in support of such motion conflict with the Ninth Circuit decision in *Atchison, Topeka & Santa Fe Railway Co.* v. *Barrett*, 246 F. 2d 846 (1957) where the denial of such a motion was held not to be an abuse of discretion because all the evidence offered and considered in support thereof was not clear and conclusive?

STATEMENT

The decision of the Court of Appeals in this cause relates to two separate appeals prosecuted by Respondents. The first of these appeals (14944) was from a judgment in the amount of $150,000 against Respondents under the allegations of a diversity complaint charging tortious contract interference. The nature of the pleadings, the issues and the judgment are correctly described in the Opinion of the Court below at p. 146. The second appeal (No. 15382) was taken from a subsequent order of the trial court denying Respondents' motion pursuant to Rule 60 (b), Federal Rules of Civil Procedure, to vacate and set aside the judgment because it was obtained by fraud and fraudulent practices on the part of Petitioners by means of which they procured and suborned perjured material testimony at the trial (A., Appeal No. 15382 at 5.)

At the trial on the merits in the United States District Court resulting in the judgment attacked by Respondents' motion, the main issue between the parties was whether or not a musical group known as The Five Blind Boys had entered into an exclusive recording contract with Petitioners on October 5, 1960, which if true was, of course, prior to Respondents' recording contract with the group dated December 22, 1960 (A., Appeal No. 14944 at 6-8, 39). Respondents maintained at the trial that Petitioner's con-

tract was not in fact executed until April, 1961 at which time it was predated by arrangement to October 5, 1960 (A., Appeal No. 14944 at 48).

Among the witnesses called at the trial on this issue were members of The Five Blind Boys consisting of Lloyd Woodard, J. T. Clinkscales, Lawrence Abram, Roscoe Robinson and Wilmer Broadnax. In addition, Abram's wife, Dorothy, also testified. All of these witnesses with the exception of Robinson testified against Respondents and to the effect that Petitioners' October 5, 1960 contract was actually executed on that date. (A., Appeal No. 14944 at 154, 341, 758, 818, 819, 1082, 1083). Robinson supported Respondents' contentions. (A., Appeal No. 14944 at 519-521). Of these witnesses, Clinkscales, Woodard, Broadnax and Mrs. Abrams were called by Petitioners (A., Appeal No. 14944 at 754, 815, 963, 1043). Woodard had also been called by Respondents as a hostile witness and his testimony was so entered (A., Appeal No. 14944 at 141, 142, 147, 149, 153, 155, 159, 563). Abrams was called as a court's witness (A., Appeal No. 14944 at 331) because his pre-trial affidavit and deposition conflicted. This was not true as to both Woodard and Clinkscales whose testimony at the trial was consistent with their pre-trial statements in favor of Petitioners.

After judgment had been entered and Appeal No. 14944 had been commenced, Respondents filed their Rule 60 (b) motion in the trial court supporting it with the affidavits of Woodard, Clinkscales and Abram. In these affidavits, these witnesses openly and freely confessed that their testimony at the trial that The Five Blind Boys had entered into their contract with Petitioners on October 4, 1960 was

false and perjured.* In this respect, they stated that such contract was not in fact entered into until the Spring of 1961 when Petitioner Robey promised them 50% of any judgment he could obtain against Respondents if they would agree to pre-date the contract to October 5, 1960 (A., Appeal No. 15382 at 17-20, 28-35, 54, 64, 66). Affiants also swore that these perjuries were suborned by Petitioner Robey (A., Appeal No. 15382 at 17, 18, 22, 32-34, 56, 57, 66, 71, 79, 81-83, 87, 90-92). Petitioners' unsworn answer to Respondents' Rule 60 (b) motion submitted no counter affidavits to those of Woodard, Clinkscales and Abram, contained no direct denials of the allegations of those affidavits and misconceived the basis for the motion as being on the grounds of newly discovered evidence. (A., Appeal No. 15382 at 117-128).

When Respondents' motion came on for hearing in the Trial Court, the following occurred:

a) Respondents presented as their witnesses Woodard, Clinkscales and Abram to testify in accordance with their affidavits. Mrs. Abram was also offered as a witness in support of the motion (A., Appeal No. 15382 at 160, 161, 167-169);

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* Thus, all but Broadnax of the Five Blind Boys are on the record as to the true date of Petitioners' contract with them. (Robinson, as above, had testified for Respondents as to this fact at the trial.) Broadnax prior to the trial signed two conflicting statements under oath. He stated at the trial that he had been paid by one of the Respondents to sign the one favoring them and had subsequently returned the money involved. The Respondent involved acknowledged the payment. Petitioners in the court below and here again try to distort this into an admission by Respondents that they had paid for a false statement prior to the trial (Ptn. 11). This is not so. Respondents have always contended that Broadnax's statement to them was true but unobtainable from him without the payment of money. (A., Appeal No. 14944 at 721-733, 737, 748-753).

b) before taking their testimony, the trial court first inquired into the protection of these witnesses' constitutional rights not to incriminate themselves and appointed independent counsel to advise with them in this respect. (A., Appeal No. 15382 at 164, 165, 168, 170);

c) after each witness had been properly advised in the premises with respect to their admissions of perjury and the consequences thereof by such counsel as well as the trial court itself, and after it had been ascertained that Respondents' counsel had likewise advised them prior to their appearance, the trial court inquired of each of them whether they still desired to testify in support of their affidavits to which all answered in the affirmative. (A., Appeal No. 15382 at 170-181);

d) the trial court then called Woodard to the stand whereupon Petitioners' counsel moved to exclude any testimony in support of Respondents' motion (A., Appeal No. 15382 at 182); and

e) the trial court, after hearing argument on this, concededly reversed its position that it would grant Respondents a hearing and stated in this connection "I had set this for hearing as Mr. Eben said. I had not entered any formal order denying the relief; I had set it for hearing, but the more I go into it, the more serious, it becomes as to whether or not I should consider this petition at all" (A., Appeal No. 15382 at 205. "So I am going to refuse to consider this petition." (A., Appeal No. 15382 at 206). "I had thought I should grant a hearing, but on further consideration, I think it is not a matter that I should grant hearing on at all (A., Appeal No. 15382 at 205). Accordingly, it refused to hear the testimony of Woodard, Clinkscales and the Abrams as to their perjuries and entered its order denying Respondents' motion (A., Appeal No. 15382 at 237-240).

The Court below in reviewing the trial court's action (or lack of it) as above held that the denial of Respondents' Rule 60 (b) motion constituted an abuse of legal discretion because the trial court not only failed to answer the basic question raised by the motion as to whether the judgment "was obtained in part by the use of perjury" but also because if had before it "unimpeached" testimony which "clearly" supported Respondents' motion. *Peacock Records, Inc.* v. *Checker Records, Inc.*, 365, F. 2d 145, 147, 148. Accordingly. the Court below in Appeal No. 15382 directed the trial court to vacate the judgment and grant Respondents a new trial. As to Appeal No. 14944, it simply directed that the judgment be vacated and remanded. (p. 148).

ARGUMENT

THERE IS NO CONFLICT OF DECISION

The Petition herein is founded upon an asserted conflict between the Ninth Circuit decision in *Atchison, Topeka & Santa Fe Railway Company* v. *Barrett*, 246 F. 2d 846 (1957) and the decision of the Seventh Circuit in the instant case. Petitioners' argument in this respect is far from clear. To the extent that it is discernible at all, it appears that it is directed to supposed differences between the two Circuits as to how an exercise of discretion is to be tested on review of the denial of a motion under Rule 60 (b) of the Federal Rules of Civil Procedure to set aside a judgment fraudulently obtained through perjured testimony suborned by a party to the action. Thus, Petitioners seem to contend that the failure of a trial court to "listen" to evidence offered in support of such a motion is considered an abuse of discretion in the Seventh Circuit whereas it is not such an abuse in the Ninth Circuit (Ptn. 16). This argument is entirely without merit and is based on an erroneous legal and factual conception of *Barrett*, as is hereinafter shown.

In both *Atchison, Topeka & Santa Fe Railway Company* v. *Barrett*, 246 F. 2d 846, 849 (1957) and the decision below, *Peacock Records, Inc.* v. *Checker Records, Inc.*, 365 F. 2d 145, 147 (1966), the two Courts of Appeals were concerned only with the District Courts' treatment on the record before the latter of the fact question as to whether the judgments attacked by the Rule 60 (b) motions were obtained in part by the use of perjury. If such perjury was established by clear and convincing evidence, both Courts of Appeal agreed that a judgment so tainted nec-

essarily would have to be vacated without weighing the effect of the perjury and that a failure under such circumstances to set aside the judgment would amount to an abuse of discretion. *Barrett*, p. 849; *Peacock*, p. 147, 148.

In the former case, the Ninth Circuit found that such perjury had not been so established on the record before the trial court because the proof there offered *and received* in support thereof was in the opinion of the Court of Appeals "far from conclusive" (*Barrett*, p. 848).*

However, in *Peacock*, the trial court never reached the question as to whether Woodard, Clinkscales and the Abrams had perjured themselves at the trial on the merits since it refused to take their testimony other than to elicit

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* That proof consisted of movies taken of plaintiff by defendant after plaintiff had obtained a judgment for head injuries manifested at the trial by the jerking and twisting of his head. p. 847. The movies indicated the disappearance of such twitching but covered only fourteen minutes during four and one-half hours of personal observation over several days. p. 848. Obviously, such proof could not conclusively establish perjury with respect to such manifestations particularly since the Court of Appeals observed that "litigation neurosis" is accepted as a medical fact and that a "psychosomatic injury may be as real as one induced by trauma." p. 849. In passing, it is pointed out that the opinion while speaking of perjury does not identify it. There is thus some question as to whether perjury in the usual sense and as distinct from fraud and misrepresentation was involved at all in *Barrett*.

from them their desire to testify as per their affidavits*. Further, in the opinion of the Court of Appeals, on the record before the trial court, perjury was "clearly" established. *Peacock,* p. 148. It is these circumstances which distinguish the two cases, and makes them consistent with each other although different results were reached. Inconsistency in this respect could exist only if it were shown that in *Barrett* the trial court refused to view the physical evidence offered in support of the Rule 60 (b) motion and that such evidence was clear and conclusive as to perjury. Actually, the opinion there clearly indicates that not only did the trial court see and weigh such evidence but the Court of Appeals also did so. *Barrett,* p. 848. Thus *Barrett* cannot stand for the proposition urged by Petitioner (Ptn. 15, 16) that a refusal to consider evidence offered in support of a Rule 60 (b) motion does not constitute an abuse of discretion where the trial court has felt the 'climate' of the trial. It does stand for the proposition that a denial of such a motion does not amount to such an abuse where a) the trial judge considers all of the evidence in support of the motion and b) such evidence is not clear and convincing as to fraud on the court. That proposition is not at variance in any way with the decision below where, as

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*It is clear from the record that these witnesses would so have testified, if permitted. (A., Appeal No. 15382 at 172, 175, 189, 191). Unlike the proof in *Barrett* based on the limited observations of others, this proffered evidence coming directly from the witnesses themselves was clear and conclusive as to the fraud perpetrated on the trial court. In fact, Petitioners in their answer to Respondents' Rule 60 (b) motion filed no counter-affidavits nor did they make any direct denials of the allegations contained in the witnesses' affidavits. No wonder the Court of Appeals found Respondents' evidence "unimpeached" p. 148. See *Klapprott* v. *United States,* 335 U.S. 601, 603, 604 (1949).

shown above, neither of these two elements were present. The reliance of the Court below on *Barrett* itself as well as *Parker* v. *Checker Taxi Company*, 7 Cir. 238 F. 2d 241 (1956) is significant in this connection.

Petitioners' argument based on *Cuthill* v. *Ortman-Miller Machine Company*, 7 Cir., 249 F. 2d 43 (1957) in no way is material to the only question presented here as to whether the Seventh and Ninth Circuits conflict and such argument should be disregarded. But worse, the decision is cited as if it barred any hearing at all on Respondents' motion because they already had "many days in court" at the trial on the merits. (Ptn. 18). This is sheer nonsense and is urged in support of Petitioners' incorrect assertion that the question of Woodard's, Clinkscales' and the Abrams' perjury at the trial was determined at the trial. Significantly, Petitioners do not point to the record below in order to support this statement nor could they in view of its patent ridiculous nature. In any event, it must be quite clear that the issue of whether a judgment was fraudulently obtained could not arise until the termination of the trial. Finally, it is pointed out that *Cuthill* instead of being against Respondents actually supports their argument. The quotation from it in the Petition (p. 18) is taken out of the context and refers to the very kind of hearing that Respondents sought here and were denied, i.e., upon a motion to vacate an alleged fraudulently obtained judgment. It has no application whatsoever as used in *Cuthill* to a prior trial on the merits as Petitioners would have this Court believe.

CONCLUSION

For the foregoing reasons and because of the lack of finality of this cause and lack of importance it is respectfully submitted that this Petition for a writ of certiorari be denied.

Respectfully submitted,

ANTHONY BRADLEY EBEN,
Counsel for Respondents.